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ABSTRACT

This paper examines recent behavior of public officials at various levels of government in the United States, finds a systemic failure to meet ethical standards, and concludes that the wisdom of James Madison has much applicability to current times. Given his keen perception of human nature, Madison would not be too surprised at today's poor ethical performance. In "Federalist #51" Madison wrote: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." (DB)

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JAMES MADISON'S PRACTICAL IDEALS FOR THE 1990s

Good evening, ladies and gentlemen. I am happy to be with you tonight to discuss "James Madison's Practical Ideals for the 1990s," and I am honored to participate in this forum with John Patrick and George Carey.

To begin, let me say that I think nothing is more essential to the wise, moral, and prudent conduct of our public and private lives than a trustworthy sense of human nature. A sense of the potential for good and for evil in all of us--a realistic assessment of human possibilities and limits--seems essential not only to the framing of any government that could pursue justice as its highest ideal, but also to the creation and implementation of justifiable public and corporate policy, *and to the decent* conduct of our friendships and marriages as well as the conscientious raising of our children.

James Madison seems to me to have held to this view. His reflections on the human condition have a certain timelessness to them, partly because he saw that to constitute a government with any chance to "secure the blessings of liberty to ourselves and our posterity" you must design it in terms of what has some permanence in humanity. Thus, Madison asked in *Federalist #51,* "What is government itself but the greatest of all reflections on human nature?" He continued, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

Madison knew, of course, that this was not just a difficulty, but rather a *great* difficulty. He wrote to Thomas Jefferson his view that "whenever there is an interest and a power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince."

And he cautioned in *Federalist #10* that where private or political interests and passions are involved, "If the impulse and the opportunity [to serve them] be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such [controls] on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is in proportion as their efficacy becomes needful." (Madison would surely have felt some sympathy for Mary Wollstonecraft's observation in 1792 in *A Vindication of the Rights of Woman* that "Men, in general, seem to employ their reason to justify prejudices. . .rather than to root them out." [p. 12])

And though he would obviously be shocked and horrified by, say, contemporary urban gangs in America and by the mobs of predators who go "wilding," he would, I think, recognize them as extreme cases of what he himself had described as the worst of human nature out of control.

Despite this clear grasp of the downside of human nature, Madison remained above the temptations of cynicism. He would have liked Tom Wolfe's observation in *The*

Bonfire of the Vanities that "cynicism is such a cowardly form of superiority." In *Federalist #55*, Madison wrote of the human capacity for excellence as well as vice:

> As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government [he added] presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

We have tasted the bitter fruit of the "inference" that human nature is incompatible with self-government and that only despotism can save us from ourselves in the moral

bankruptcy of right- and left-wing tyrannies for the past seventy years. But this underestimate of human potential strikes very close to home as well.

A recent study by Donald Kanter and Philip Mirvis called *The Cynical Americans* discloses that forty-three percent of the workforce in the United States believe that "lying, being two-faced, and doing whatever it takes to make a buck are all part of basic human nature." Seventy-eight percent of employed Americans do not trust their managers and superiors to tell the truth to anybody, including them. Quite naturally, they also believe that any changes advocated by management are designed to get something for nothing from the employees, and that the interests of their institutions and their own interests are in direct conflict in what amounts to a zero-sum game.

Under such conditions, the Iron Rule -- "Do unto others before they do unto you" -- threatens to gain a lot more adherents than the Golden Rule -- "Do unto others as you would have them do unto you."

Carl Taylor of Jackson Community College in Michigan recently did a study of scavenger, territorial, and corporate street gang members in Detroit published as *The Dangerous Society*. All but three of the youths said that "the most important part of a life" is money. The other three listed a car as the most important. The HUD scandals, the S and L debacle, and the behavior of elected officials at the state and federal level who avidly lined their campaign chests and thereby their pockets with contributions from the thrift operators who have remorselessly betrayed every taxpayer, show that a lot of people in high places believe exactly the same selfish and morally impoverished things.

That's not all, of course. Developing circumstances in Eastern Europe and the Soviet Union threaten to breed enormous cynicism worldwide as the ostensible decline of Soviet tyranny leads to disappointments. Crime rates in Eastern Europe are already rising dramatically, new public officials who know nothing of democracy or traditions of public trust will be tempted to commit acts of corruption as shabby as those of their communist predecessors. Nationalist and ethnic hatreds that rise out of centuries of petty and major European wars, and that have simmered just under the surface for the last fifty years or more, are rising once again. Anti-semitism is staggering in some of these places, and there

is a desperate race already to get as many Jews out of the Soviet Union as possible while the getting out is good--despite deliberately inflated Aeroflot prices for airfares for Jews that suggest how dreadful the racism there has always been. Racism in the United States (and elsewhere) will, I fear, fuel and be fueled by these developments.

And inside the United States, the emergence of the modern "politician's therapeutic defense" against charges of wrongdoing--as in the cases of Mayor Barry in Washington, Congressman Lukens in Ohio, and others--will further erode respect for standards of decency in public life.

The "politician's therapeutic defense" runs like this: *First*, "I didn't do it." *Then*, when it's proved that the politician did do it, "I did it, but it isn't wrong." *Then*, when it's shown that the behavior is illegal or morally wrong or both, "OK, I did it, and it's wrong, but you violated the procedures in investigating me." When it's shown that this rejoinder is false, *then* the politician says, "Well, you may have followed the procedures, but others do this and get away with it, so you must have had an ulterior motive for investigating me"--either partisan politics, or racism, or gender prejudice, or homophobia, and so on. So

when the investigating agency proves this is not true either, the final defense becomes, "But I was sick when I did that, a victim of an illness, so it wasn't really me, and I don't deserve criticism but compassion. I'll get some treatment for a few weeks, and then I'll be my old trustworthy (or *new* trustworthy) self.

A number of adolescents in Washington--wisdom from the mouths of babes--say that Barry's drug use and related misconduct will make it easier for traffickers to recruit children and teenagers into drug trafficking, because they believed in Barry when he urged them *not* to sell or use, and now their faith is shattered. Weak public servants, including police, will also use such conduct by public officials to excuse their own misconduct. "Everybody," they will say, "does it." The government of Columbia is delaying extradition of drug cartel members to the United States, asking in the aftermath of the Barry trial, "What is the point?" And I very much fear that outpourings of compassion for public figures will be little more than mindless sentimentality that obscures attention to compassion for those of their constituents they have most grievously wronged.

Troubling and dangerous as these phenomena are, none of them would provide any reason for Madison to revise his view of human nature. In the face of them, he would, I am confident, continue to insist, as he did in *Federalist #51,* that "Justice is the end [ultimate purpose] of government. . .the end of civil society." And, in keeping with his estimate of human nature, he would still stress, as he did in *Federalist #57*, that "The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust." I believe, though, that he would now say "men and women."

But the problem that Madison addressed in *Federalist #57* has dimensions in our time that he would, I think, find particularly arresting. It is the problem of the "double standard" in government--the ability of agencies or individuals in government to treat themselves with favoritism and special privilege as compared to other branches of government (and often the public as well). Madison was sufficiently concerned that he asked in *Federalist #57* how republican government is to protect itself against a legislature

that "favors the elevation *of* a few on the ruins of the many." His question had been raised initially by opponents to ratification of the Constitution who argued that the House of Representatives would consist of men who, because of their class, would have little sympathy with the general public and would aim at "an ambitious sacrifice of the many to the aggrandizement of the few."

Madison's answer was that the means of securing virtuous public servants and constraining them from illicit pursuit of self-interest are frequent elections, based on the principle that the legislature "can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society." That principle, he wrote, "creates bonds between [the rulers and the people], that communion of interests and sympathy of sentiments. . .without which every government degenerates into tyranny." How is the principle kept vital? By the "vigilant and manly spirit which actuates the people of America--a spirit which nourishes freedom and in return is nourished by it," declared Madison. He added, "If this spirit ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty."

In our times, the principle has been repeatedly violated, and in recent years, it has become commonplace for public servants and aspirants to office in Washington to vaunt ethical as well as legal double standards inside government that contradict the spirit Madison so cherished and trusted.

In practice, the situation that most imperils the public good is the one in which a public official can betray the public without fear of adverse consequences. Police and corrupt judges and defense attorneys sometimes achieve this by secrecy and conspiracies of silence. Legislators have, by the stroke of a pen, legalized their own untrammeled pursuit of self-interest at the public expense--an even better shield than conspiracy. In such cases, above all, weak and bad character in individuals leads to unrestrained behavior.

In early 1987, the Congress and staff aides shared a 3 percent salary increase, but a much larger increase was proposed for members of Congress. In March 1987, Congress could have limited these large increases; instead, it "strategically 'missed' the deadline for voting to reject."[1] Since a vote was required to reject the large raises but not to receive

them, members of Congress were able to profit by deliberate inaction. At a time of concern for government deficits, "missing" the deadline was a convenient way of being able to say, "I never voted for the raise."

But the resultant salary raises left a new gap between the salaries of Congressmen and the salaries of key aides. To fill the gap, just before Christmas 1987 in a "catchall continuing resolution. . .to fund operations of agencies Congress inserted four paragraphs "written in congressional legalese, a useful language when one wants to get a job done without anybody knowing what's being done"[2] that enabled some aides to receive raises of up to $10,000 in 1988. Other government employees do not benefit from this standard of compensation; in 1988, their increases were two percent.

I will not rehearse Congress's attempt to repeat these actions in 1988-89, or all the problems of Political Action Committees, or the difficulty of getting a hearing on the Hill without making financial contributions, but to those problems should be added the common practice among interest groups of paying speech honoraria in order to get a hearing.

Perhaps such practices explain why so many people in Washington claim that lobbying is "an industry that loves working in the shadows."[3]

In 1961, "there were 365 registered lobbyists in Washington; by 1987, that number had risen to 23,011."[4] It is in this context that on March 8, 1988, William F. Weld, then head of the Justice Department's Criminal Division, said at the National Press Club that Congress enjoys the benefits of a double standard. He explained that members of the executive branch are prohibited from "handling matters in which they have a financial interest, from accepting money in addition to their government salaries for their duties, or from lobbying their former agencies on certain issues."[5] But such actions are "perfectly all right if committed by a member of Congress." Weld referred to legal payments of $2,000 by a coal company to each member of a congressional committee on mining legislation simply for touring its facilities.[6]

What is palpably worse than any of these specific actions or others that you are, no doubt, aware of, is the debasement of the spirit of uniform standards of wisdom and virtue in government itself. Lately, it has become fashionable in Washington to insist that *there*

should be a double standard within government that calls for greater probity, self-control, and good judgment from some public servants than from others. The advocacy of a double standard is entirely different from the advocacy of a higher standard for all public servants than for the gneral public, and I do not know of a time when the double standard has been so baldly and thoughtlessly endorsed by government officials.

On March 31, 1988, Senator Patrick Leahy of Vermont, in an interview on the MacNeil/Lehrer News Hour, insisted that the attorney general, then under investigation, had a duty to step aside. I agreed with this position because I knew from my work that the Justice Department was in fact without an agenda and that the attorney general was so preoccupied with self-defense that the Department threatened to be indefinitely adrift. But Leahy argued that it would be all right for a cabinet officer at HUD or Labor to continue in office under the circumstances--yet not all right for the attorney general. The attorney general had to live by a higher standard, he declared. When asked whether *he* would step aside if accused of similar offenses of which he believed himself innocent, Leahy replied, "If I were attorney general, of course I would have to step aside." Clearly he meant that *as*

a senator, he would not need to do so. I trust subsequent revelations at HUD have confirmed the danger of his position.

Later I called the senator's press secretary to offer the senator a chance to take a more defensible position before I included a description of the interview in my book on ethics in policing. We spoke several times, and finally the press secretary said in a voice of complaint, "Well, Ed, you have to remember that the senator is not *accustomed* to being listened to this closely."

The same advocacy of a double standard arose in the confirmation hearings for John Tower as the nominee for Secretary of Defense. Many senators--and even Tower himself--held that the Secretary of Defense must be more temperate and trustworthy than other public servants because he is in the nuclear chain of command.

Now, I insist that the standards of temperance and trustworthiness for a secretary of defense must be very high. And I do not think Tower could meet them. But that is not my point. My point is that the duties of a secretary of defense to the public and the public

interest are no greater than those of congressmen and judges who enact laws and decide cases that profoundly affect for better or worse the lives of citizens every day. A congressman whose intemperance with alcohol diverts him from careful study of questions of enforceability of laws or from comprehensive planning of legislative programs regarding, say, narcotics is as great a threat to the public weal, to the safety of police, school teachers, and the general public, and to the prudent investment of personnel and money, as any other public servant could be. A judge who drinks too much and listens to cases less attentively because he is hung over is a disgrace to the rights of due process every American is entitled to enjoy; he affects lives ad immediately and dramatically as any secretary of defense has ever affected them. A cop who intemperately spends himself into debt is as vulnerable to corruption as an intelligence analyst or legislative staff member, and all three may be too distracted by worry to face crises with full attention. And if a *prospective* government official in the executive branch seems to be compromised by consulting contracts with industrial corporations *when he is not in office,* surely it is true that a congressman is at least as tainted by honoraria accepted from private interests when he *is* in office.

It is not difficult to extend the examples. Year before last, nearly thirty building inspectors in New York were indicted for extortion. Did they need less excellence of character than a cabinet officer? In practice, a building inspector on the streets affects individual lives fully as much as a secretary of defense--and the misbehavior of a building inspector does not become tolerable simply because he cannot push a nuclear button. In fact, in the routine affairs of daily life, a building inspector who can be blackmailed over a drug habit or philandering is potentially more dangerous because he can act with greater independence than anyone in the nuclear chain of command, and he is much less visible.

Madison would surely be as resolute today as he was in his lifetime in opposing double standards as both unjust and foolish. He might remind us that double standards tend to set government and the citizenry apart as adversaries: *us and them*, rather than as the "We" who pursue the ideals of the Preamble to the Constitution. I suspect that Madison would not have a high opinion of much of the current talk about ethics in government. The sour, holier-than-thou moralizing and finger-pointing, the self-flagellation of the media, the preoccupation with supposed dilemmas that are not really dilemmas at all, the idea that individual wisdom and character can be replaced by ethics committees and legislation, are

scarcely to be celebrated. In the end, they are as likely to give ethics a bad name as to accomplish anything better.

I think Madison would recall us to the need for public servants with "most wisdom to discern and most virtue to pursue" the common good, and to the need for "precautions for keeping them virtuous."

But perhaps most of all, he would ask us what we are doing as parents, teachers, adults in the company of our friends and colleagues, and companions of the young to forge that *"vigilant spirit"* that recognizes and will not tolerate striking injustices--the spirit that stands upright in public and in private for what is best in human nature.

Thank you.

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[1] Causey, *A Double Standard*, The Washington Post, February 25, 2988, at D2.

[2] *Ibid.*

[3] McAllister, *Lobbying: Bigger Money, Bigger Stakes*, The Washington Post, January 4, 1988, at A8.

[4] Alice-Leone Moats, *Power Game Has Changed in D.C.*, The Philadelphia Inquirer, May 3, 1988, at 27A.

[5] Marcus, *Justice Official Assails Congress' Double Standard in Ethics*, The Washington Post, March 9, 1988, at A4.

[6] *Ibid.*